

HUMAN SERVICES BOARD

INTRODUCTION

The petitioner filed her appeal in July 2009. By agreement of the parties the Department conducted a Commissioner's Review of the matter resulting in a decision dated August 25, 2009. Inasmuch as the Department's review did not resolve the matter, the parties agreed at a telephone status conference held on September 10, 2009 that the petitioner would file a written response to the Commissioner's Review decision. The petitioner filed her arguments on September 21, 2009. The following findings of fact regarding the violations that remain at issue are based

on the uncontested oral representations the parties have made and on the documents they have filed to date.

FINDINGS OF FACT

1. On May 26, 2009 a Department licensing official visited the petitioner's registered family day care home. While she was there she observed two things that she and, ultimately, the Commissioner determined were violations of the Department's Family Day Care Home regulations.¹

2. One of those violations relates to an emergency exit. On her registration application the petitioner listed three emergency evacuation exits from her home. One was through a door onto her front porch. The petitioner admits that the porch is at least eight feet above the ground beneath it.² During the site visit it was observed that wooden lattice that had served as a barrier on the porch was broken in several places, which would have allowed children to fall through.

3. The petitioner admits that the lattice had been broken by winter ice falling on it. She maintains, however, that she had planned to fix it on the July 4th weekend. The

¹ Other "violations" initially cited were subsequently either reduced to the status of an "observation" or removed from the Department's records.

petitioner alleges that in the meantime she had told all the parents not to use that entrance or exit to her house. She maintains that because she had two other functioning emergency exits to her home, it shouldn't be considered a violation if one of them was "temporarily out of use".

4. The other citation concerned the petitioner's use of a plastic covered diaper changing mat with a tear in it, where germs could be harbored. The petitioner does not dispute that ordinarily a torn mat is potentially unsanitary. She alleges, however, that the tear was "tiny", but that she had nonetheless already ordered a replacement mat online. She also stated that when changing children's diapers on the torn mat she placed the mat in a position so that the tear "would be as far away from the diapering area as possible". She also alleges that she only had two children in "pullups" at that time, so that she used the table only if there was an "accident". The petitioner also maintains that she had disposable mats available to put over the pad.

5. The petitioner does not take issue with the Department's positions that she could have repaired her porch

² The Department's licensor had observed it to be about fifteen feet above the ground.

sooner and could have stopped using the diaper mat altogether when she noticed it was torn.

ORDER

The Department's decisions are affirmed.

REASONS

At the outset, it must be noted that this case does not involve a decision by the Department regarding the petitioner's day care registration. It is only whether two of the conditions noted in the Department's Field Visit Report of its inspection of the petitioner's facility on May 26, 2009 constituted "violations" of the Department's family day care home regulations. If so, a notice of those violations is listed on the Department's web site for the public's information.³

Regulation V10 of the Department's regulations provides:

Children in care shall be protected from any and all conditions which threaten a child's health, safety and well-being. This includes protecting children from stoves, pools, poisons, window covering pull cords, asbestos, wells, known vicious animals, medications, dust or chips from lead paint, traffic, and other hazards.

³ The Board notes that the Department could probably avoid many appeals in these matters if its web site specified that cited violations have been corrected.

As noted above, the petitioner does not dispute that an unprotected railing on an emergency exit and a torn diaper changing mat are potentially hazardous conditions. She maintains, however, that these conditions, as they existed in her home on May 26, were temporary, and that she had taken adequate precautions to protect her children from them until they were remedied.

Given that the sole purpose of the Department's regulations is to protect the health and safety of children, and that the mere posting of violations in day cares on the internet is intended to be informational, rather than punitive, the Board has consistently granted the Department deference and leeway in its interpretation of what constitutes a violation of its regulations. As the Board noted in a recently-decided case: "Parents are, of course, free to judge for themselves what constitutes unacceptable safety hazards for their children. However, it cannot be concluded that the Department is acting beyond its discretion to publicize, as a guide to *all* parents, that the petitioner's day care, on at least one occasion, was observed to have had a potentially hazardous safety condition." Fair Hearing No. Y-03/09-159.

The violations in this case may well have been relatively minor in terms of their actual "hazard". However, inasmuch as the Department's decisions in this case are supported by the evidence and constitute a reasonable interpretation of its own regulations, they must be affirmed by the Board. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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